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No. 65

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CRESCENT EXPRESS LINES, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Brief for Crescent Express Lines, Inc., Appellant.

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Opinion Below.

The opinion of the District Court (R. 30-36) is reported in 49 F. Supp. 92.

Jurisdiction.

The jurisdiction of this Court is invoked on direct appeal taken under Section 210 of the Judicial Code, Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 220, U. S. C. A. Title 28, Section 47a. The decree of the District Court dismissing the complaint was dated February 27, 1943 and was entered on March 6, 1943 (R. 28).

The order allowing appeal was entered on April 16, 1943 (R. 36). On or about May 7, 1943 appellees, the United States of America and Interstate Commerce Commission filed a joint motion to affirm. On or about May 5, 1943, intervenors, Hudson Transit Lines, Inc., and Mountain Transit Corporation filed statements opposing the jurisdiction of this Court and motions to affirm. This Court, on June 7, 1943, postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 170).

Statement of the Case.

The Appellant and its predecessors prior to, on, and since June 1, 1935 conducted a common carrier business transporting passengers for hire between New York City, N. Y., on one hand, and points and places in Sullivan and Ulster Counties, New York, on the other, traveling via New Jersey. There is no difference between Appellant and its predecessors insofar as operations are concerned and in referring to Appellant's operations it is intended to cover operations by Appellant's predecessors. The operating rights of Herman Trevax *et al.* were transferred to Appellant in October, 1940, and such transfer was made pursuant to the rules and regulations of the Interstate Commerce Commission and the statutes applicable thereto; the Interstate Commerce Commission entered its formal order authorizing substitution of Appellant for its predecessors (R. 112-113).

Appellant in its operations sold transportation to individual passengers going to different destinations in the same vehicle, in the same way that different passengers traveling in the same railroad car go to different destinations. The motor vehicles used were of the sedan or limousine type.

The Interstate Commerce Commission after due investigation issued its order granting a grandfather certificate to Appellant's predecessors on May 7, 1938 (R. 99-100). Thereafter it issued its order dated June 20, 1938 (R. 103-105), making a slight modification but which was in all other respects the same as its order of May 7, 1938. The order of June 20, 1938, was correct and properly described the rights that Appellant was entitled to.

On September 2, 1941 after the lapse of over three (3) years, the Commission without any further evidence, investigations or hearings issued a new order dated September 2, 1941 which is the subject of this action and appeal (R. 115-117).

The order of September 2, 1941 was issued by Division 5 of the Commission and granted a certificate authorizing certain grandfather rights to Appellant, but said rights as granted were different from those granted by Division 5 by its orders of May 7, 1938 and June 20, 1938. The Commission in issuing the order of September 2, 1941 exceeded its statutory powers.

The order of September 2, 1941 is set forth in full (R. 115-117) but the material part thereof which describes the rights granted reads as follows (R. 106-107, fols. 171-172):

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from

June 1, to October 1, inclusive, over irregular routes, * * *."

Appellant objected to the said order of September 2, 1941, and exhausted all procedural steps before the Commission but the Commission failed to set the order aside (R. 158 and 167).

Appellant then brought the present action to vacate, set aside, annul and enjoin the said order of September 2, 1941 (R. 2). The United States District Court for the Southern District of New York made its decree and judgment dated February 27, 1943 entered March 6, 1943 dismissing the complaint with costs, and also rendered its opinion referred to above (R. 28).

Appellant in this Court, as it did before the Commission and in the Court below, alleges that the order of September 2, 1941 is illegal and beyond the statutory power of the Commission, and is contrary to the evidence given by the Appellant only. Appellant objects to said order because of:

1. The limitation of the operating rights so that Appellant should transport not more than 6 passengers in any one vehicle, not including the driver thereof and not including children under 10 years of age who do not occupy a seat or seats;

2. The limitation to door-to-door service;

3. The limitation to irregular routes;

4. The limitation to non-scheduled operations;

5. The limitation or description of the rights authorized as special operations; and because

6. The said order of September 2, 1941 was made without any evidence or procedure to support it.

Appellant's position is that the Commission attempted to restrict Appellant to the use of a particular type of vehicle even though the Appellant had the statutory right to add to its equipment and facilities as the development of its business and the demands of the public might require under Section 208a of the Motor Carrier Act of 1935. In order to effect a limitation or restriction on Appellant's rights to use any type of equipment including buses, the Commission followed the indirect method of limiting Appellant so as to prohibit it from carrying more than 6 persons besides children under 10 years of age who do not occupy a seat or seats.

Appellant does not want or expect this Court to write the form of the order which Appellant is entitled to, or to pass on disputed questions of fact, or to substitute its judgment for that of the Commission. This case involves the power of the Commission to deny to Appellant a statutory right that Appellant has to use any type of motor vehicle, whether a large bus seating 30 or 40 people, or a small bus seating 15 or 20 people, or a sedan or limousine seating 7 or 8 people. Appellant's position appears to be supported by the clear wording of the order of September 2, 1941. The order does not prevent or bar Appellant from using buses or any other type of motor vehicle regardless of size or style; the order only bars Appellant from *carrying* more than 6 people besides children in any one vehicle. The effect of the order circumvented the express terms of the proviso of Section 208a of the Motor Carrier Act of 1935 which is as follows:

> "Sec. 208 (a). Any certificate issued under section 206 or 207 shall specify * * *: PROVIDED, HOWEVER, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or with the territory specified in the

certificate, as the development of the business and the demands of the public shall require.''

Appellant also alleges that the Commission issued its order of September 2, 1941 without any notice to Appellant and without taking any further evidence to support the said order. (See Finding of Fact numbered 6, R. 29.) The order of June 20, 1938 was vacated by the order of September 2, 1941 (R. 116) but no hearing was had or evidence was given to justify the issuance of the last order. The orders of May 7, 1938, June 20, 1938 and September 2, 1941 were issued by Division 5 of the Commission. The Appellant respectfully submits that the orders of Division 5 dated May 7, 1938 and June 20, 1938 were surely supported by the evidence before the Commission, so that the change made by the Commission on September 2, 1941, required evidence to be taken to support that order. The lower Court expressly found that no additional evidence had been taken (Finding No. 6, R. 29). The serious error that the lower Court made is in finding that notice of a hearing after June 20, 1938 had been given. There is nothing in the record to support that finding. In fact, the possibility of a hearing is negatived by the facts. Protestants were demanding a hearing by their exceptions in order to prove that the order of June 20, 1938 was incorrect and erroneous and that the witnesses in support of the application gave false evidence (R. 102 and 109). Now, if a hearing had been held after June 20, 1938, the protestants were required to establish by *evidence* that testimony given in support of the application was false and untrue *but no evidence was taken in support of the order of September 2, 1941* (R. 29). Appellant, therefore, submits that the order of September 2, 1941 was unjustified from the point of view of procedure, and was given without evidence to support it. This subject will be discussed *post* under Point VI.

The other grounds of objection to the order of September 2, 1941 are that the Commission improperly described the rights granted as being special operations in a door-to-door service over irregular routes in non-scheduled service. These terms were incorrect because the Appellant's predecessors operated between fixed termini in a two-way service, in an area which has only one road so that routes could not be irregular. The operations conducted carried passengers paying individual fares and going to different points of destination en route. Passengers did not charter an entire vehicle to make a trip. The lower Court specifically stated in its opinion and findings that service could be given from offices, which are terminals (R. 35; Finding of Fact No. 3, R. 29; Conclusion of Law No. 3, R. 30). The restriction to non-scheduled service is without foundation and is contrary to the statute. Under Section 208 (a) of the Motor Carrier Act of 1935 a specification of the service to be rendered does not cover scheduled or non-scheduled route service and in issuing certificates to carriers using buses, the Commission does not specify that their service shall be scheduled or non-scheduled. The lower Court referred to the Commission's use of the term "special operations" as meaning the same as irregular routes although the reason for using two terms to mean one thing is open to inquiry.

The lower Court dismissed the complaint on the merits with costs although the lower Court admits in its opinion that the "whole subject was new and confused and the Commission itself was divided in opinion," and expressly supports the Appellant insofar as Appellant claimed the right to serve terminal or station points (R. 35). The Conclusion of Law No. 3 (R. 30) preserved that right claimed by Appellant. The complaint should not have been dismissed if the lower court granted any modification

of the Commission's order of September 2, 1941, because to that extent at least the Appellant was successful.

1. Questions Presented.

1. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the operating rights of the Appellant so that the Appellant should transport not more than six passengers in any vehicle, not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats.

2. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the right granted to door-to-door service.

3. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the rights granted to irregular routes.

4. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 limiting the rights granted to non-scheduled operations.

5. Whether the Interstate Commerce Commission was correct in making the order of September 2, 1941 describing the rights granted as special operations.

6. Whether the Commission was correct in making the order of September 2, 1941, without having any evidence given by protestants to contradict the appellant's proof, so that the exceptions (R. 101 and 107) filed by the protestants (intervenors-appellees here) were wholly unsupported by evidence.

2. Opinion and Decree of the Court Below.

The lower court made its Findings of Fact (R. 28-30) and Decree (R. 28) and its Opinion (R. 30-36).

The lower court in the said decision and findings of fact has taken a position beyond that taken by the Interstate Commerce Commission. The Interstate Commerce Commission did not restrict or limit the type of vehicle to be used by the Appellant, but restricted the Appellant to transporting not more than six people at any one time besides children. The *effect* of the Commission's order resulted in a restriction on the type of equipment used as it would be unprofitable to operate 12, 20, 30 or 40 passenger vehicles with only 6 people in it. The lower court in its findings of fact made, Finding No. 8 (R. 29) reading as follows:

> "8. The certificate restricts the plaintiff to the use of cars, capable of carrying not more than six passengers, not including the driver and children under 10 years of age who do not occupy a seat or seats."

There is nothing in the Commission's order which in anywise supports this finding of fact. The order of September 2, 1941 specifically provides that the Appellant shall not transport more than six people without mentioning any type of motor vehicle. As will be indicated *post*, the Commission circumvented the statutory restriction on its power contained in the proviso in Section 208a of the Motor Carrier Act of 1935.

The Court in Conclusion of Law No. 2 at R. 29 states:

> "2. The Commission lawfully restricted the equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935:"

There is nothing in the statutes themselves that justified the Commission or the lower Court in restricting the

right of the Appellant under the proviso of Section 208a of the Motor Carrier Act of 1935 to unlimited expansion and use of any kind of motor vehicle.

The lower Court in its opinion (R. 34, fol. 57) said that the purpose of Congress in the enactment of the grandfather clause was anamolous in giving grandfather certificate carriers the privilege of "indefinite quantitative expansion" and that "* * * possibly Congress did not realize that it was going as far as it did." The lower Court erred in making that statement because *Congress deliberately intended that there should be an indefinite, unlimited right of a carrier to increase its equipment and facilities without any restriction.*

The proviso contained in Section 208a was inserted by the Senate Committee *79 Cong. Rec. 5663.* See *A Legislative History of the Motor Carrier Act of 1935* by Warren H. Wagner, page 53. There is no claim by the Appellant that it has the right to change the type of service rendered on the grandfather date, June 1, 1935, but the Appellant vigorously asserts the right to the use of any motor vehicle regardless of capacity and to carry more than six passengers therein, and protests against the act of the Commission in avoiding the prohibition contained in the statute against restricting appellant's equipment indirectly, by limiting the Appellant to the transportation of only six passengers at one time. The lower court (R. 34) said that however free a carrier may be to add to his service in amount that the type of vehicle affects the quality of transportation. If the Appellant had used a vehicle of an uncomfortable and undesirable style on June 1, 1935 and thereafter as a result of scientific improvement, or the natural development of the motor vehicle industry, was able to secure comfortable vehicles, the *quality* of the service would be improved, and even though improved, would not constitute a change in the type of service. It is the privilege that a

carrier has under Section 208a to improve and expand its service, and certainly Congress never intended that a carrier or the public should be condemned forever to the precise type of vehicle used on June 1, 1935 because any change in the type of vehicle, according to the lower Court's opinion, would be a change in the type of the service. The statute does not make quality of service a test and the lower Court was in error on this point. The lower Court in Finding of Fact No. 3 and Conclusion of Law No. 3 (R. 29, 30) held that the Appellant is entitled to operate between stations or offices. In doing so, a passenger who is transported between an office at the point of origin to an office at the point of destination, is transported no matter what kind of vehicle is used and if a commodious vehicle such as a bus is used, the type of service is not changed. The lower Court in its opinion (R. 34) said that a commodious motor bus capable of seating 40 or 50 passengers would be unwholly unsuitable. There is nothing in this record whatsoever to support such a statement in the lower Court's opinion. Operation between an office, which is a terminal, in New York City to an office or terminal in the mountain area is served equally well by any type of motor vehicle. The entire purpose of the Commission was to restrict a carrier such as the Appellant from using a different type of vehicle than was used on June 1, 1935, although the use of a different vehicle would in no wise change the character or type of the service rendered on, and since, the grandfather date.

Other phases of the lower Court's opinion are discussed under respective points.

Specification of Errors to Be Urged.

Appellant intends to urge all of the errors assigned in the Assignment of Errors (R. 37).

The lower Court erred herein:

1. In making Finding of Fact numbered "6" insofar as it states that the Commission gave notice to the plaintiff of a new hearing, in the absence of evidence of what said new alleged hearing consisted of, and in the absence of any evidence by protestants being given on such alleged hearing in opposition to the order of June 20, 1938.

2. In making Finding of Fact numbered "7" that the certificate issued on September 2, 1941 "specifies" the service rendered by the plaintiff and its predecessors as of June 1, 1935.

3. In making Finding of Fact numbered "8" in finding that the certificate restricts the plaintiff to the use of cars capable of carrying not more than six passengers not including the driver and children under 10 years of age who do not occupy a seat or seats.

4. In making Conclusion of Law numbered "1" that the order of September 2, 1941 was adequately supported by evidence.

5. In making Conclusion of Law numbered "2" that the Commission lawfully restricted the equipment and facilities of the plaintiff in accordance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935.

6. In making Conclusion of Law numbered "3" that the restrictions in the certificate upon the plaintiff's services to non-scheduled operations, the authorized route as "special and irregular" and the service as "door-to-door," were lawful.

7. In making Conclusion of Law numbered "4" in dismissing the amended complaint upon the merits with costs.

8. In making the Decree and Judgment herein dismissing the complaint in that the same are contrary to law, contrary to the evidence and contrary to the Findings of Fact and Conclusions of Law.

Summary of Argument.

The position of the Appellant in this matter falls into three parts. The Commission was without power to restrict the Appellant from carrying more than six passengers at one time. In view of the statutory restriction on the power of the Commission contained in Section 208a of the Motor Carrier Act of 1935 the Appellant contends that the Commission cannot indirectly force a limitation of the kind of vehicle to be used by restricting the number of passengers to be carried. The lower Court erred in going beyond the Commission's decision stating that the Commission was right in restricting the Appellant to cars (R. 29) where even the Commission made no such restriction.

The second principal phase of the Appellant's position is that the record does not support the Commission in restricting the Appellant to door-to-door service over irregular routes in non-scheduled operations, which were described as special operations. Appellant is fully aware that this Court will not write the form of certificate needed, but will leave the same to the Commission. *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489. It is the function of the Commission to write the form of certificate provided that in so writing it, the Commission does not exceed its statutory power or disregard the facts. The Commission itself interpreted special operations as meaning charter operations going to different points over irregular routes whereas in the case at bar, operations were always between New York City, on one hand, and points in Sullivan and Ulster Counties

on the other. There is nothing special about it as the passengers purchased individual tickets and paid individual fares and were transported to different destinations. The lower Court held that the Appellant had the right to operate between fixed stations, which are fixed termini, and to operate between them is further evidence of the fact that Appellant was entitled to a certificate authorizing operations between such fixed termini rather than a door-to-door service. The distinction made by the lower Court (R. 35) that the fact that passengers were picked up and set down at places of their own choosing made the whole route irregular, is not correct because any motor carrier stops upon request to pick up or discharge passengers. The route does not become irregular because some passengers get off before going all the way to an office or terminal, or if they board the vehicle en route. All motor carrier transportation gives a flexible service where passengers can flag a vehicle and get aboard to be transported. Such occasional passengers do not create a different type of service so as to change an operation over regular routes into an operation over irregular routes. Please note that Section 208a of the Motor Carrier Act of 1935 specifies three types of service (1) over regular routes, (2) between fixed termini and (3) territorial service. The Commission has been incorrectly treating the first two classes as though a carrier had to operate over regular routes in order to operate between fixed termini. The findings of fact and conclusions of law made by the lower Court show that Appellant operated to and from stations or offices which are fixed termini but the Appellant was denied relief. The routes could not be irregular because up to Wurtsboro there is only one road (Finding of Fact No. 4, R. 29), to wit, Route 17, which continues on past Wurtsboro, to Monticello, Liberty and Livingston Manor, where most of the business is done. The

fact that all the vehicles did not go to the end of the line did not make the route irregular. Vehicles went to different destinations and between such points and points of origin the route was regular and not irregular.

The third phase of the Appellant's position is that the Commission changed its order of June 20, 1938 without any procedure or evidence to justify such change and without notice. The order of June 20, 1938 had been preceded by an earlier order on May 7, 1938, substantially the same in form (R. 99-100). The order of June 20, 1938 (R. 103-105) was thereupon issued and without any further procedure the Commission made the order of September 2, 1941. In the Motions to Affirm the intervenors, Mountain Transit Corporation and Hudson Transit Lines, Inc., state that there never was any question as to the facts. Mountain Transit Corporation was the successor to Yelloway Transportation Corporation, *et al.*, which filed exceptions to the order of May 7, 1938 and which exceptions are set forth at R. 101-103. In those exceptions the Appellant's proof was disputed and charges were made that the proof offered by Appellant's predecessors was false, and that an opportunity was desired to prove the falsity of the Appellant's proof. Thereafter the order of June 20, 1938 was issued and exceptions were filed by Hudson Transit Lines, Inc. (R. 107-109), and the same charges were made and a request for an opportunity to prove the falsity of the statements contained in Appellant's proof. No further hearings were had and no proof was given. The lower Court made Finding of Fact No. 6 (R. 29) that no additional evidence had been taken in support of September 2, 1941. There was no evidence to support the lower Court's statement that the Commission gave notice to the Appellant of a new hearing. If there had been a new hearing as the lower Court found, the exceptions filed by Mountain Transit Corporation's prede-

cessors to the order of May 7, 1938, and the exceptions of Hudson Transit Lines, Inc., to the order of June 20, 1938, were not supported by proof having been given by either of these protestants; the record remained in *status quo*, and surely did not support the revocation of the order of June 20, 1938 without additional evidence to sustain the order of September 2, 1941.

The Commission itself has been changing its decisions on its power to restrict a carrier to one type of equipment and the lower Court in its opinion said that "the Commission itself was divided in opinion" (R. 36). There has never been a final court adjudication with respect to the power of the Commission under the applicable sections of the Motor Carrier Act. This case for the first time presents the matter for adjudication.

1. Statutes Involved.

The statutes involved are as follows: Section 203 (a), Subdivision 13 of the Motor Carrier Act of 1935:

> "(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 206 (a) of the Motor Carrier Act of 1935:

> "No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the

Commission authorizing such operations: *Provided, However, That,* subject to section 210, if any such carrier or predecessor in interest was in *bona fide* operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in *bona fide* operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, * * *."

Section 207 (a) of the Motor Carrier Act of 1935:

"Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Section 208 (a) of the Motor Carrier Act of 1935:

"Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6): *Provided, however,* That no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

ARGUMENT.

POINT I.

The restriction to transporting not more than 6 passengers besides the driver and children is contrary to the statute and is illegal and unlawful.

The phraseology of the order of September 2, 1941, is an attempt to get around the express wording of Section 208a of the Motor Carrier Act of 1935. Appellant contends that the Commission has no statutory power to restrict Appellant from using any type or size of motor vehicle which it desires to use, and that the statutes applicable expressly give Appellant that right, and expressly limit the Commission's power to restrict such right.

At the outset, Appellant states that it used motor vehicles in its operations. These vehicles were of the sedan or limousine type seating 7 persons. The order of June 20, 1938 did not restrict Appellant to any particular type of motor vehicle, directly or indirectly. The order which is the subject of this action has ignored the statute applicable by making the restriction prohibiting the Appellant from transporting more than 6 persons at any one time.

The appendix to the order of the Commission dated September 2, 1941 describing the rights granted reads as follows (R. 106-107):

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle,

but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1, to October 1, inclusive, over irregular routes, * * *."

Section 203 (a), Subdivision 13, of the Motor Carrier Act of 1935 defines a motor vehicle as follows:

"(13) The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semi-trailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails."

Section 208 (a) of the Motor Carrier Act of 1935 provides as follows:

"Any certificate issued under sections 206 or 207 shall specify * * *: PROVIDED, HOWEVER, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

The Commission by restricting Appellant to the transportation of not more than 6 passengers besides children has indirectly restricted and limited the Appellant from using any type or size of motor vehicle even though such motor vehicles fall within the statutory definition under Section 203 (a), Subdivision 13. It is to be noted that the restriction in the Commission's order of Septem-

ber 2, 1941 does not prevent Appellant from using any kind or size of vehicle, but merely restricts Appellant from transporting more than 6 passengers in the vehicle used. This is very peculiar because it permits the Appellant to use a bus seating 40 people but prevents the plaintiff from filling the seats in excess of the maximum 6. Inherent in the very restriction is the recognition that the type or size of vehicle could not be limited or restricted as set forth in Section 208 (a) of the Act. The Commission has attempted to circumvent the statute by preventing the transportation of more than 6 persons at one time.

The *issues*, therefore, are very clear; that is whether the Commission has the power to restrict a carrier to one particular size of vehicle, and whether it has the right to do indirectly what it could not do directly. The law itself specifically recognized that all motor driven vehicles should be treated alike and to prevent any restriction of the use of different or larger type vehicles, made the definition of a motor vehicle all inclusive so as to cover all types of motor vehicles.

The first principal stop after leaving New York City enroute to the mountain area, is Wurtsboro which is about 85 miles from New York City. Roscoe, the furthest point, is about 125 miles from New York City. The tariff filed by plaintiff provides for a charge of ½ fare for children from 5 to 12 years of age. These children are entitled to a seat for a trip of 85 to 125 miles. The order, however, prevents Appellant from transporting more than 6 passengers and children under 10 years of age who do not occupy seats in any one vehicle. The order does not take into consideration a situation where 6 adult passengers seeking transportation bring with them one or more children each, all of said children being from 5 to 10 years of age. It would be physically impossible to use a small vehicle seating only 7 passengers with a group of 6 adults and several children. If Appellant

were to use larger equipment so as to accomodate these additional passengers safely and comfortably and in a manner proper for human beings, this Appellant would be prevented from seating the children, or from using the additional seating capacity of such equipment for additional fare-paying passengers. At this point we reach an impasse. It would not be an answer to say that Appellant should run more small size vehicles, because the labor and fuel costs are almost the same for a heavy limousine vehicle as it is to operate a larger vehicle seating 30 or 40 passengers. It is no answer to say that Appellant should refuse transportation because as a common carrier it would be illegal and unbusiness like for it to do so. The present war conditions emphasize the need for group transportation as an economical and proper method of carrying passengers, and it was the clear statutory intent that the Commission should not limit or restrict a carrier in any way from using various types and sizes of equipment.

To permit such a restriction would be an unlawful discrimination. It is not a reasonable classification because the Commission does not require carriers who used 29 to 33 passenger vehicles to continue to use 29 to 33 passenger vehicles, nor does it restrict or limit carriers using 29, 33 or 40 passenger vehicles from using smaller size vehicles, or limit them to the number of passengers transported at any one time, so that we have a clear discrimination applied against carriers who used small size vehicles on the grandfather date.

Appellant further submits that all motor vehicles regardless of seating capacity fit the statutory description of a motor vehicle set forth in Section 203 (a), Subdivision 13. A vehicle must be safe and comfortable and if the public needs and requires better and larger equipment, an operator should supply same. It would be unusual to require an operator to provide less suitable

equipment than is necessary just because equipment which was used on June 1, 1935 has become inadequate due to subsequent conditions. An applicant does not enlarge his franchise by using larger pieces of equipment and the Motor Carrier Act does not prohibit a carrier from using larger or smaller vehicles than that used on June 1, 1935, the grandfather date.

The Commission in the present instance has tried to "freeze" the plaintiff to the use of sedans because sedans were used by it on the grandfather date. This is directly contrary to the statute and is illegal and void.

In *United States of America* and *Interstate Commerce Commission* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488, the Supreme Court said:

> "Its prior opportunity should not be restricted beyond the clear requirements of the statute. For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights."

In *Alton R. R. Co.* v. *United States*, 315 U. S. 15, the Court held that conditions of operation existing on June 1, 1935 were not to delimit operating rights to said date.

Applying these cases to the case at bar, this Court should not allow the Commission to "delimit" the plaintiff to the exact type of equipment used by it on the "grandfather" date and to "freeze" it to the use of such equipment, or allow this result to be accomplished by the indirect method of limiting the number of passengers to be carried at one time.

The Commission has attempted to justify its avoidance of the proviso of Section 208 (a) by advancing the argument that it is not limiting a carrier to any type of equipment or quantity of equipment, but that it is only describing the service to be rendered by such carrier. In making such description however the Commission describes, fixes and "freezes" the carrier to one type of equipment.

The Commission's restriction limiting transportation to 6 passengers has no legal justification. It is contrary to the statute as above indicated. An operator can use 12 passenger sedans. Why restrict it to 6 passengers? Why not 12 passengers? Why not 29 passengers. The Commission has attempted to overcome the restrictions placed upon it by the statute. It has read into the statute a new limitation. It has no such power and by the order in question the Commission has abused its power and has fixed upon the Appellant an unlawful restriction which should be vacated, set aside and annulled.

The lower Court in this matter went far beyond the Commission's order of September 2, 1941 and made Finding of Fact No. 8 and Conclusion of Law No. 2 (R. 29).

The lower Court made Finding of Fact No. 8 as follows (R. 29):

> "8. The certificate restricts the plaintiff to the use of *cars*, capable of carrying not more than six passengers, not including the driver and children under 10 years of age who do not occupy a seat or seats." (Italics ours.)

The lower Court made Conclusion of Law No. 2 as follows (R. 29):

> "2. The Commission lawfully restricted the equipment and facilities of the plaintiff in accord-

ance with Sections 206, 207 and 208 of the Motor Carrier Act of 1935."

It is, therefore, obvious that the lower Court apparently failed to note that the order of the Commission dated September 2, 1941 did not restrict Appellant to the use of any kind of vehicle. The order of the Commission was designed to effect such a restriction indirectly. Congress did not intend that the *status quo* existing on June 1, 1935 insofar as the kind of equipment was concerned should be forever frozen without regard to future development.

The amount of service can be increased by more vehicles or by the use of vehicles having a larger seating capacity. There was no justification on the part of the lower Court to interpolate into the statute the word "quantitative" so that the increase in facilities under Section 208 (a) of the Act would mean that a carrier could increase its facilities only by increasing the number of identical type vehicles used on June 1, 1935. The lower Court, could not increase the restriction which the Appellant sued to set aside. The Appellees did not file any counterclaim asking for affirmative relief on the part of the lower Court.

The lower Court in its opinion said that the Commission would be stripped of all power except to fix routes if it was not permitted to restrict the type of equipment (R. 34). But this is not so. Section 208 (a) states that the Commission shall specify the type of service to be rendered with the restriction that it shall not limit additions to equipment and facilities.

The Interstate Commerce Commission has apparently extended Section 203 (b) of the Motor Carrier Act of 1935 (now Interstate Commerce Act, Section 203 (b) which provides as follows:

"(b) Nothing in this part, * * * shall be deemed to include * * * (2) taxi cabs, cars or other motor vehicles performing a *bona fide* taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini;"

The Commission has applied that part of Section 203 (b) which applies to operations which are exempt from regulatory control under the Act and which are not within the power of the Commission, and applied it to the Appellant, which was conducting a type of business which is within the regulatory scope of the statute. This stretching of the law invades the rights of the Appellant. If the Appellant is of the class of carriers described in Section 203 (b) it has the right to operate without any control whatsoever from the Commission, and can carry 6 or less passengers. If the Appellant is within the scope of the statute, it is entitled to the protection of the proviso contained in Section 208 (a) to add to its equipment and facilities as the need requires, and under Section 203 (a) 13 such motor equipment can be of any type, style or size.

If the Commission desires to have such power in the face of the restriction contained in Section 208 (a) of the Motor Carrier Act, and which has since been reenacted in identical form in Section 208 (a) of the Interstate Commerce Act, 49 Stat. L. 552, U. S. Code Title 49 Sec. 308, the Commission should secure that power from Congress by amending Section 208 (a), rather than by extending its power by so construing the statute as to indirectly effectuate the prohibited result.

The Interstate Commerce Commission has given interpretations of the statute involved on four occasions in the cases of *Matter of Nudelman* and *Matter of Sullivan County Highway Lines.* In the *Nudelman* case, 22 M. C.

C. 275, the Commission first held that it had no power to restrict a carrier to a particular type of equipment which was used on the grandfather date. Thereafter the Commission reversed its decision by a second decision made in the same *Nudelman* case in 28 M. C. C. 91. The second decision of the Commission (one Commissioner out of three dissented) held that a limitation of the size of equipment could be made by the Commission. In the *Sullivan County Highway Lines* case, 21 M. C. C. 717, the Commission first held it had no power to restrict a carrier to one type of equipment, and then reversed itself in the same case in 30 M. C. C. 133, one Commissioner out of three dissenting. We therefore can consider the entire question *de novo* because the uncertainty about correct interpretation still exists until we have a final ruling from this Court on this appeal. The lower Court in its opinion (R. 36), said that:

> "• • • the whole subject was new and confused, and the Commission itself was divided in opinion."

Commissioner Lee dissented from each of the second decisions in the *Nudelman* and *Sullivan County Highway* cases stating that the Commission had no power to restrict a carrier from adding to its equipment, any kind of motor equipment without regard to whether the same type of equipment had been used on the grandfather date.

In the case of *Irving Nudelman Common Carrier Application*, 28 M. C. C. 91, the dissenting opinion of Commissioner Lee is as follows:

> "LEE, *Commissioner*, dissenting in part:
>
> I agree with the conclusions of the majority except for the limitation applying to the maximum number of passengers which may be carried in any one vehicle. With respect to this limitation, I ad-

> here to our original decision in this case, *Nudelman Common Carrier Application*, 22 M. C. C. 275, which followed a similar decision in *Sullivan County Highway Line, Inc., Com. Car. Applic.*, 21 M. C. C. 717. We held that under the proviso of section 208(a) 'we may not restrict applicants to the use of vehicles of the sedan type,' and that 'limitation of the number of passengers to be carried at one time in any vehicle to six would be merely an indirect restriction of the size of the vehicles to be used.' The decisions relied on do not support the position that we have power to impose the limitation. For example, in authorizing the transportation of petroleum products in tank trucks, we do not limit the maximum quantities to be carried in any vehicle, nor do we limit the size of such vehicles."

The number of persons carried on the grandfather date nowhere appears in this case except that 7 passenger cars were used. These cars could carry 8 passengers or even 9 passengers including the driver. The number of passengers carried at one time does not fix the type of service rendered or the manner in which they were transported. Where more people demand more service, the Appellant has the right to provide more service. Such added service can be given in any vehicle so long as the type of service given on the grandfather date is not changed, but the use of a larger vehicle does not change the service. It may improve it but that is not illegal. A truck carrier using a one ton truck on the grandfather date is not prohibited from using a ten ton truck if he needs it in his business; similarly, a passenger carrier may use any size vehicle without limitation. This appeal shows the method used to "freeze" Appellant to one type of vehicle.

The transportation of passengers between a point of origin to a point of destination is accomplished without regard to the size or style of vehicle used, and without regard to whether the style of vehicle used on the grandfather date is continued. Even if the size of the vehicle used on the grandfather date is subsequently abandoned and a different type of vehicle is used no change in the character of the service is effected by a mere change in the type of vehicle used. The carrier under Section 208 (a) of the Motor Carrier Act of 1935 has the right to add to its equipment and facilities as the development of its business and the demands of the public shall require. The decree and judgment appealed from has stripped the proviso of Section 208 (a) of all meaning and has deprived the Appellant of the benefits given thereunder.

This case presents an issue of vast importance to the motor carrier industry of the United States. A number of orders have been issued by the Commission with restrictions, limiting the number of passengers to be transported and the final determination of this case will affect carriers throughout the United States, as well as affecting the future actions of the Commission.

POINT II.

The limitation to door-to-door service is contrary to the opinion, findings of fact and conclusions of law of the lower Court.

The lower Court held that Appellant operated from an office at 169th Street in the Bronx, which is in New York City and could operate from any other office or station (Finding of Fact No. 3, R. 29, Conclusion of Law No. 3, R. 30). The operation between offices or terminals is an

operation between fixed termini. The lower Court in its opinion at R. 35 says that operations between fixed places or offices are really door-to-door. In what respect does any other operation, by buses or other vehicles, operate between fixed termini? All operations between fixed termini operate in the same way, to wit, between terminals or offices at each end of the line. The very findings and opinion of the lower Court establish Appellant's position that the order of June 20, 1938 (R. 105) correctly described Appellant's operations as being between fixed termini and that the order of September 2, 1941, did not correctly describe the rights which Appellant is entitled to, and that the lower Court by its own Findings and Conclusions, and its opinion, was required to sustain the complaint herein in this respect. The decree appealed from cannot stand because it is not supported by the opinion, findings and conclusions. The decree must follow the findings and conclusions, and the failure to do so was assigned as error by Appellant (Assignment of Error No. 8, R. 38).

POINT III.

The inclusion of the words "irregular routes" is incorrect and inapplicable. Appellant operated between fixed termini.

The use of the term over irregular routes by the Commission in its order of September 2, 1941 (R. 117) is incorrect and does not apply to the facts involved in this case. There is only one route between New York City and the mountain area.

Appellant states that in operating between Sullivan and parts of Ulster Counties, which is in the mountain area, and New York City at the other end, that vehicles

must follow the route over the George Washington Bridge or the Lincoln or Holland Tunnels and then along Route 4 and Route 17 New Jersey (formerly Route 2) which connects with Route 17 and then into Sullivan County, and via Route 209 at Wurtsboro to Ellenville and other points in Ulster County.

The change at Wurtsboro is necessary in order to serve the Ulster County area. Vehicles are required to follow Route 17 through Wurtsboro to Monticello, Liberty and Livingston Manor. The fact that all vehicles do not go to the same destination on the same trip does not make the route irregular. Each schedule on each trip may go to different destinations or part way over the route. It is the same as trains which operate on a railroad which do not cover all of the routes on every trip. In fact, a right to operate over irregular routes may be deemed a greater right than a certificate granting regular routes. In the latter situation a carrier is confined to such regular routes whereas in operation over irregular routes a carrier could be free to operate over any route.

Section 207 (a) of the Motor Carrier Act of 1935 states:

> "PROVIDED, HOWEVER, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operation over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

It is, therefore, obvious that the geographical situation in this area compels the use of a regular route or operations between fixed termini. This is especially so as was indicated under Point II herein, that the lower court specifically found that operations were conducted from offices, which are terminals, or fixed termini. Appellant is therefore en-

titled to the benefits of the specific findings and conclusions of the lower Court and the complaint should have been sustained so as to eliminate the description of operations as being over irregular routes and a correct certificate showing Appellant's operations to be between fixed termini as set forth in the order of June 20, 1938 (R. 103-105). The reason that Appellant wants a clear and correct description of its rights even if they may be less than that authorized, is that Appellant wants to continue the type of operations that were conducted on the grandfather date. If Appellant were to continue operations between fixed termini as indicated, it may run the risk of the Commission holding, on some later date, that Appellant has forfeited its rights by becoming a regular route carrier. This was pointed out to the lower Court at the time of the hearing herein and the lower Court in its opinion (R. 35) states that the fear of forfeiture is "fanciful." This fear is not fanciful but is real and apparent. The extent to which the Commission has gone to restrict the Appellant to the use of a particular type of equipment by restricting the number of passengers to be carried, establishes the fact that Appellant has a right to be concerned about the situation. The Appellant should not be placed in the uncertain position where its rights may be jeopardized upon the assumption that nothing will be done to harm Appellant. It should be remembered that the intervenors in this matter will make every effort to harass Appellant and under the circumstances, the Appellant wants exactly what it is entitled to; no more and certainly, no less.

In considering the method of operations to be employed by Appellant, it should be noted that since Appellant has the right to operate between stations or terminals, which are fixed termini, that Appellant may be called upon to carry a larger number of people between a fixed terminal in New York City, to a fixed terminal in

the mountain area, such as Monticello. There being only one road between New York City and Monticello it stands to reason that the one route is followed and will be followed daily in both directions. In the summer time when traveling is very heavy in this area, large numbers of people are transported in both directions, over the same routes, and the order of the Commission which is the subject of this appeal is incorrect and contrary to the evidence, and the lower Court should have sustained the complaint and set the order aside because the operations of Appellant were conducted between fixed termini even if the routes are designated as irregular. See *Alton R. Co.* v. *United States*, 315 U. S. 15, 20, where this Court indicated the Commission can describe service to be over "specified routes *or* between fixed termini." (Italics ours.)

POINT IV.

The limitation to non-scheduled operations is illegal and in excess of the statutory authority of the Commission and is discriminatory.

The statutes, Sections 206 (a) and 208 (a) of the Motor Carrier Act of 1935 as indicated above, do not authorize the Commission to place a negative restriction upon operations.

The Commission has omitted the term "non-scheduled" from the following certificates:

Alfred Koopman, MC 95430, certificate issued on August 25, 1942;
Charles Filler, MC 96100, certificate issued on November 18, 1942;
Samuel Schick, MC 95407, certificate issued on November 26, 1942;

Ben Friedman, MC 95431, certificate issued on July 29, 1942;

George Greenberg, MC 95346, certificate issued on July 29, 1942.

The certificates issued in the above cases by the Commission do not contain restrictions to non-scheduled operations and the form of rights granted in the aforesaid certificates is as follows:

> "Passengers and their baggage, is special operations, during the season extending from the 15th day of May to the 30th day of September both inclusive, over irregular routes, traversing New Jersey for operating convenience,
>
> Between New York, N. Y., * * * Sullivan County, N. Y.
>
> RESTRICTION: The transportation authorized herein is limited to not more than six passengers in any one vehicle, excluding the driver and children under ten years of age who do not occupy a seat or seats."

It can therefore be seen that the Commission itself has omitted any reference in these cases as to scheduled or non-schduled operations and the inclusion of this restriction in the case at bar is discriminatory, unfair and arbitrary. This question has never been determined with respect to the power of the Commission to include the restriction to non-scheduled operations where the statute prescribes the grandfather rights merely to be over routes, between fixed termini or within territory authorized.

The order of June 20, 1938 issued to Appellant's predecessors does not specify non-scheduled or scheduled operations (R. 105). In cases of certificates issued to oper-

ators using buses, the Commission has not specified either scheduled or non-scheduled operations so that the negative restriction inserted in the order of September 2, 1941 of "non-scheduled operations" is improper and is without any foundation in law, or in the evidence to support it.

POINT V.

The limitation or description of Appellant's operations as "special operations" is ambiguous, illegal and void.

The order of September 2, 1941 describing the rights granted as "special operations" is ambiguous. The Commission cannot describe Appellant's operations as "special operations" because there is nothing special about them. Appellant sold tickets to individual passengers and transported them between points of origin to points of destination. There is nothing special about that.

The words, special operations, are really applicable to charter operations where there are special or individual trips made by groups who hire the entire vehicle for an individual trip. In such complete hiring of an entire vehicle there is a special status because of the individual nature of each trip going to a particular destination for the purpose of an outing or for a special purpose. That is not applicable to the Appellant's operations because vehicles are in operation daily to and from the points authorized, and on a daily basis throughout the season authorized, and tickets are sold to individual passengers to be transported in such vehicles. Vehicles are not hired for individual trips such as taxicab trips. There is nothing special about such operations any more than the operations of railroads are special where it operates trains daily and sells tickets to different points.

Appellant objects further to such a description because under Sections 206a and 208a of the Motor Carrier

Act of 1935, Appellant is entitled to a certificate as a grandfather operator and that certificate must specify the rights granted over regular routes, between fixed termini or within a territory.

Appellant is unable to know the meaning of "special operations" and would be placed in a disadvantageous position by being subjected to whatever interpretation the Commission may place thereon at some future date.

The Commission in the case of *Peninsula Transit Corp.*, 1 M. C. C. 440, 442, held that special or charter operations mean:

> "Only those common carriers of passengers who are engaged, or propose to engage exclusively in the transportation of special or chartered parties are required to obtain a certificate specially authorizing such operations."

That case differs from the case at bar because Appellant charges individual fares to each passenger going to a different destination, and passengefs do not charter the entire vehicle.

In the *Red Star Sightseeing Lines, Inc.*, 1 M. C. C. 521, the Commission held with respect to special operations that (p. 525):

> "• • • we conclude that the proposed sightseeing and pleasure tour operations of applicant are special operations within the meaning of that term as used in the proviso to Section 207 set forth above."

At page 526 the Commission said:

> "We find that the present and future public convenience and necessity require the issuance of a cer-

tificate to applicant authorizing it to operate as a common carrier by motor vehicle, in special operations for the transportation in interstate or foreign commerce of passengers and their baggage on round-trip sightseeing or pleasure tours over irregular routes beginning and ending at Broadway and Palmetto Street, Brooklyn, N. Y., with no pick-up or discharge of passengers or baggage at any point * * *."

In the *Red Star* case every one went on the same tour or pleasure trip, starting out and returning together, but the Appellant in the case at bar does not conduct that type of business. Appellant sells tickets to individuals, takes passengers going to different destinations in the same vehicle, takes passengers in one direction, and other passengers in the reverse direction, operates several times daily, and in fact carries on a regular common carrier business which in no respect falls under the attempted description of "special operations".

The Commission in the case of *John G. Schuster* MC 106, decided November 10, 1942 found that that applicant was a common carrier entitled to operate:

> "* * * in special operations on round-trip sightseeing or pleasure tours beginning and ending in Shenandoah, East Mines, * * * with no pickup or discharge of passengers and baggage en route, * * *."

It is therefore obvious that the term "special operations" does not apply to the Appellant because Appellant conducts regular common carrier operations between New York City on one hand and various points and places in Sullivan and Ulster Counties, New York on the other.

Special operations are described in the *Red Star* case, *supra,* and in the *Schuster* case, *supra,* and do not apply to the Appellant's operations.

The lower Court herein in its opinion, in discussing the subject of special operations, used the numbering of the sections in the United States Code, Title 49, and referring to Section 308 said (R. 33):

> "Section 308(a) defines what shall be the contents of such certificates: they must 'specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in the case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate.' (We interpret special * * * operations in the proviso to Sec. 307(a), as meaning the same thing as 'operations not over specified routes,' just quoted from Sec. 308(a); *i. e.* operations within a defined territory not upon regular routes, or between fixed termini)."

It is apparent that the construction placed upon the meaning of the words "special operations" by the lower Court is different that that placed upon it by the Interstate Commerce Commission. Section 207 (a) of the Motor Carrier Act of 1935 provides that any certificate issued shall be over regular routes or between fixed termini "except as such carriers may be authorized to engage in special or charter operations". The Commission in the *Red Star* case and *Schuster* case, *supra,* did not use those words in the disjunctive but applied them together to the type of operations described in the quoted parts of those decisions.

The difficulty with the opinion of the lower Court is that Section 207 (a) of the Motor Carrier Act of 1935 does not apply to the Appellant's operations. The opening phrase of Section 208 (a) reads:

> "Sec. 208. (a) Any certificate issued under section 206 or 207 * * *."

The statute apparently distinguishes between a certificate granted to a carrier under the grandfather clause of Section 206, and a certificate granted to a new operator under Section 207. The lower Court applied Section 207 (a) to the case at bar although it is not applicable.

The Conclusion of Law No. 3 made by the lower Court states that the Appellant has the right to operate from any fixed station in Sullivan County or at any other station, and that, in itself eliminates any possibility of Appellant's operations being special operations (R. 30).

The Commission was in error in calling Appellant's operations special and the lower Court in making the Decree and Judgment appealed from did not follow the Conclusion of Law which it made and which could not possibly support the Decree in this respect.

POINT VI.

The order of September 2, 1941 was made without any hearing or evidence in support thereof.

The lower Court ruled that the Commission gave notice of a new hearing before it changed the order of June 20, 1938 (Finding of Fact No. 6, R. 29). There is nothing in the record to support this statement. The exceptions which were filed by Hudson Transit Lines, Inc. (R. 107-109) and by the predecessors of Mountain Transit Corporation (R. 101-103) specifically asked for the right

to present proof to disprove the evidence given in support of the application by Appellant. Such a hearing has not been held and the absence of proof by protestants corroborates the lack of a hearing. Division 5 made the orders of May 7, 1938, June 20, 1938 and the same Division made the order of September 2, 1941. Such administrative procedure would mean that an applicant would never know what the same Division would hold at some future date upon the same evidence. There must be some fair limit, and the continual change of orders as was done in this case without any further evidence to support the last order unjustly affects the rights of Appellant.

The lower Court in its opinion (R. 36) says that Appellant (plaintiff in the Court below) does not now allege that any other evidence would have changed the result. The fact that Appellant does not offer any proof now does not change the fact that Appellant had the right to rely upon its proof and upon the order of June 20, 1938 and in the absence of any proof by the protestants, the Commission was without justification in revoking the order of June 20, 1938.

The lower Court failed to consider the fact that Appellant was seeking relief in this action and not the Appellees. The protestants who were the intervenors in this case, sought an opportunity to offer proof of claimed false evidence given on behalf of the application. No such proof was given by protestants on such alleged hearing. In the face of such a situation, the Commission was wholly unjustified in ignoring its own order of June 20, 1938 without any further evidence to sustain the new order. See Finding of Fact No. 6 (R. 29).

There is nothing in the record to support the Finding of Fact made by the lower Court in this matter as to notice of a hearing nor is there any evidence that notice

was given to the Appellant of a hearing after the order of June 20, 1938. The effect of the order of September 2, 1941 without requiring the protestants to give the proof they allegedly claimed they had, resulted in the loss by the Appellant of the order of June 20, 1938, without the intervenors supporting their exceptions. A pleading before the Court does not constitute proof by itself, and the failure of the Commission to take proof in support of the exceptions filed by protestants, and changing the order on the same evidence on which the Commission made the orders of May 7, 1938 and June 20, 1938, was erroneous and illegal.

Conclusion.

It is respectfully submitted that this Court should take jurisdiction in this matter because of the vast importance involved in the interpretation of the statutes herein, and because of the unlawful restrictions placed upon the Appellant, contrary to law and contrary to the facts, and that the Decree and Judgment from which this appeal was taken should be reversed and the order of June 20, 1938 reinstated.

Respectfully submitted,

GEORGE H. ROSEN,
Attorney for Appellant.

Dated: October 12, 1943.